

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANH V. VO, ) CASE NO. C05-0401-JLR-MAT  
Plaintiff, )  
v. )  
JO ANNE B. BARNHART, Commissioner ) REPORT AND RECOMMENDATION  
of Social Security, ) RE: SOCIAL SECURITY  
Defendant. ) DISABILITY APPEAL  
\_\_\_\_\_)  
\_\_\_\_\_)

Plaintiff Anh V. Vo proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) and Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be AFFIRMED.

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## **FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1953.<sup>1</sup> He completed high school and at least three years of college. Plaintiff previously worked as a self-employed commodities trader, an importer, and a manufacturing representative.

Plaintiff applied for SSI and DI in April 2002, alleging a disability onset date of December 30, 1999 due to chronic pain in his chest and low back due to the presence of shrapnel.<sup>2</sup> His applications were denied initially and on reconsideration, and he timely requested a hearing.

ALJ Roberta Alexis conducted a hearing on March 8, 2004, taking testimony from plaintiff and vocational expert Dr. Susan Stewart. (AR 24-85.) The ALJ issued a decision denying plaintiff benefits on June 17, 2004. (AR 14-23.) Plaintiff appealed the ALJ's decision to the Appeals Council, which declined to review plaintiff's claim. (AR 6-8.) Plaintiff appealed this final decision of the Commissioner to this Court.

## **JURISDICTION**

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not

<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

<sup>2</sup> Plaintiff previously received disability benefits from 1985 through 1993. (AR 26.)

01 engaged in substantial gainful activity since his alleged onset date. At step two, it must be  
02 determined whether a claimant suffers from a severe impairment. The ALJ found severe plaintiff's  
03 degenerative disc disease of the lumbar spine, shrapnel injuries, and Post-Traumatic Stress  
04 Disorder (PTSD). Step three asks whether a claimant's impairments meet or equal a listed  
05 impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any  
06 listed impairments. If a claimant's impairments do not meet or equal a listing, the Commissioner  
07 must assess residual functional capacity (RFC) and determine at step four whether the claimant  
08 has demonstrated an inability to perform past relevant work. The ALJ found plaintiff unable to  
09 perform his past relevant work. If a claimant demonstrates an inability to perform past relevant  
10 work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains  
11 the capacity to make an adjustment to work that exists in significant levels in the national  
12 economy. The ALJ found plaintiff could perform other work existing in significant levels in the  
13 national economy, such as work as a check cashier, office clerk, and call out operator.

14 This Court's review of the ALJ's decision is limited to whether the decision is in  
15 accordance with the law and the findings supported by substantial evidence in the record as a  
16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
17 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
18 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
19 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
20 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
21 2002).

22 In this case, plaintiff raises several arguments, all relating to his pain. The Commissioner

01 asserts that the ALJ's decision is supported by substantial evidence and should be affirmed. For  
 02 the reasons described below, the undersigned agrees with the Commissioner and recommends that  
 03 the ALJ's decision be affirmed.

04 Credibility

05 Plaintiff argues that the ALJ erred in rejecting his testimony regarding the disabling nature  
 06 of his pain. He describes the ALJ's credibility assessment as "cursory." The Commissioner asserts  
 07 that the ALJ properly rejected plaintiff's subjective allegations.

08 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
 09 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*  
 10 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an  
 11 ALJ must render a credibility determination with sufficiently specific findings, supported by  
 12 substantial evidence. "General findings are insufficient; rather, the ALJ must identify what  
 13 testimony is not credible and what evidence undermines the claimant's complaints." *Lester v.*  
 14 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "We require the ALJ to build an accurate and logical  
 15 bridge from the evidence to her conclusions so that we may afford the claimant meaningful review  
 16 of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In  
 17 weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness,  
 18 inconsistencies either in his testimony or between his testimony and his conduct, his daily activities,  
 19 his work record, and testimony from physicians and third parties concerning the nature, severity,  
 20 and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789,  
 21 792 (9th Cir. 1997).

22 An ALJ must set forth specific reasons for discrediting a claimant's testimony as to excess

01 pain; that is, pain unsupported by objective medical findings. *Varney v. Secretary of Health &*  
 02 *Human Servs.*, 846 F.2d 581, 584 (9th Cir.), *results on rehearing modified in part on other*  
 03 *grounds in* 859 F.2d 1396, 1398 (9th Cir. 1988). However, such testimony may not be discredited  
 04 based solely on the lack of full corroboration by objective medical evidence. *Id.*

05 In assessing plaintiff's credibility, and his assertion as to the level of his pain, the ALJ  
 06 stated as follows:

07 In assessing the claimant's "RFC", the [ALJ] carefully considered the claimant's  
 08 testimony concerning his subjective complaints and limitations. The claimant testified  
 09 that pain in his low back radiates down his leg. He also reported the existence of pain  
 10 in his chest. All of his pain increased with changes in weather, according to his  
 11 testimony. Furthermore, he admitted that this pain was reduced by 40% with the use  
 12 of medication, a TENS unit and a "pain patch".

13 The claimant testified in a forthright manner, but his testimony does not support a  
 14 conclusion that his "RFC" prevents all work activity. Instead, his testimony provided  
 15 support for the conclusion that some work activity was possible. For instance, he  
 16 reported a reduction of pain through the use of a number of modalities. And his  
 17 testimony indicated a rather normal day in which he performed such activities as  
 18 attending classes at North Seattle Community college, reading books, driving his car,  
 19 and watching television. In regard to his pursuit of further education, the claimant  
 20 reported that he is a recipient of a Pell grant as he proceeds to change his career.

21 The medical evidence also fails to support the claimant's belief that he cannot perform  
 22 any work. A physical capacity evaluation in March 2002 showed that he had a normal  
 23 posture (Ex. B15F-39). It was noted that his actual exercise test performance was  
 24 limited by a severely guarded effort. And this evaluation also stated the claimant had  
 25 an out-of-proportion" [stet] tolerance of lifting.

26 Other studies have shown similarly odd findings. According to Ted Rothstein, M.D.,  
 27 in his report dated November 1, 2001, there was no explanation for the claimant's  
 28 complaints of left arm and hand paresthesia. The objective findings did not conform  
 29 to peripheral nerve or dermatomal distribution. His loss of vibration was non-  
 30 physiologic (Ex. B5F-3). Accordingly, the "RFC" determined in this decision is an  
 31 accurate description of the claimant's ability to function.

32 (AR 19-20.)

01 The ALJ provided specific reasons for discrediting plaintiff's excess pain testimony and  
02 clear and convincing reasons for rejecting his testimony as to the alleged extent of his limitations  
03 – including the reduction of plaintiff's pain through various modalities; inconsistencies between  
04 plaintiff's testimony and his daily activities, educational pursuits, and the medical record; and  
05 various "odd findings" in the record. She did not discredit plaintiff's excess pain testimony based  
06 solely on the lack of fully corroborating objective medical evidence. Therefore, contrary to  
07 plaintiff's contention, this credibility assessment was neither cursory, nor in any other respect  
08 deficient.

## RFC and Hypothetical

10 Plaintiff argues that the ALJ failed to adequately consider his pain-related limitations or  
11 to include those limitations in proffering a hypothetical to the vocational expert. The  
12 Commissioner maintains that the ALJ's hypothetical, and the RFC upon which it was based,  
13 properly summarized plaintiff's functional limitations.

14 RFC is the most a claimant can do considering his or her limitations or restrictions. See  
15 Social Security Ruling (SSR) 96-8p. A hypothetical posed to a vocational expert must include all  
16 of the claimant's functional limitations supported by the record. *Thomas*, 278 F.3d at 956 (citing  
17 *Flores v. Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)). A vocational expert's testimony based  
18 on an incomplete hypothetical lacks evidentiary value to support a finding that a claimant can  
19 perform jobs in the national economy. *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993)  
20 (citing *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991)).

21 In assessing plaintiff's RFC, the ALJ found as follows:

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01 The claimant is limited to a light level of physical exertion with additional restrictions.  
02 This conclusion is based on the assessments of the claimant's "RFC" found in the  
03 record. For instance, Robert Hoskins, M.D., a medical consultant for the Disability  
04 Determination Service (DDS) did such an assessment on September 14, 2002 (Ex.  
05 B11F). This physician concluded that the claimant was able to lift and carry 20  
06 pounds occasionally and 10 pounds frequently. The claimant was also found able to  
07 sit and to stand/walk for 6 hours during an 8-hour workday. His ability to push and  
08 to pull was unlimited. The only physical limitation was in only an occasional ability  
09 to climb ladders, ropes and scaffolds (Ex. B11F).

10 The claimant's treating physician reached very similar conclusions about the  
11 claimant's physical functioning (Ex. B15F). Dina Eisinger, M.D., reported the  
12 following assessment in 2003 concerning the claimant's abilities:

13 "I believe that Mr. Vo is capable of meaningful work in the long term only  
14 within stringent physical conditions. These would include: No lifting greater  
15 than 20 pounds; no frequent bending, stooping, or twisting; no activities  
16 involving high fall risk; no impact activities; change position often; limit  
17 sit/stand/walk to one-half hour at each time; limit driving to 20 minutes at a  
18 time; avoid vibrational stress".

19 In looking at both of these assessments as well as the entire record, the [ALJ] has  
20 concluded that the claimant is able to lift and carry 10 pounds frequently and 20  
21 pounds occasionally. He cannot perform any frequent bending or twisting. The  
22 claimant needs to avoid moving machinery and vibrating equipment. His ability to sit,  
stand and walk is limited to 30 minutes at a time during an 8-hour workday.

23 Additional restrictions to the "RFC" come from the claimant's [PTSD]. As noted by  
24 Dr. Halfant in her assessment of the claimant's mental functioning, he is limited to  
25 simple, repetitive work tasks and precluded from complex and detailed work  
26 activities.

27 In reaching these conclusions about the claimant's [RFC], the [ALJ] acknowledges  
28 that Dr. Eisinger issued a "To Whom It May Concern" letter in April 2002 that stated,  
29 "In my opinion, Mr. Vo is likely to have permanent and disabling pain as a result of  
30 the above conditions (shrapnel" (Ex. B15F-26). [stet] Dr. Eisinger concluded this  
31 letter by stating that the claimant was 'permanently disabled from gainful  
32 employment". [stet]

33 However, the [ALJ] did not give great weight to this opinion. The letter does not cite  
34 objective findings that support the conclusions. Furthermore, the opinion in this letter  
35 is inconsistent with Dr. Eisinger's later conclusion that work activity was possible  
36 within certain parameters and that the claimant's pain medication would not cause him

01 to be incapable of employment (Ex. B15F).

02 . . .

03 (AR 18-19.) The ALJ went on to consider plaintiff's credibility, as outlined above. (AR 19-20.)

04 In the hearing, the ALJ proffered a hypothetical to the vocational expert corresponding  
05 with the RFC assessment described in the decision, and the vocational expert identified two  
06 positions – check cashier and office clerk. (AR 75-77.) The ALJ also proffered a second  
07 hypothetical, modifying the first hypothetical to reflect an individual who could lift only five  
08 pounds, sit for two hours during the course of a day, was limited in reaching, fingering, pushing,  
09 pulling, and handling, and could never climb, balance, stoop, crouch, kneel, or crawl. (AR 78-79.)

10 The vocational expert identified the position of call-out operator in response to that hypothetical.

11 (AR 79.) Based on this testimony, the ALJ concluded, considering his age, educational  
12 background, work experience, and RFC, plaintiff was capable of making an adjustment to work  
13 existing in significant numbers in the national economy. (AR 21.)

14 As reflected in the decision, the ALJ did consider plaintiff's pain-related limitations and  
15 assessed him accordingly. The ALJ then crafted hypotheticals taking into consideration the  
16 functional limitations supported by the record. As such, plaintiff fails to demonstrate any error in  
17 either the RFC assessment or the hypotheticals proffered to the vocational expert.

18 Somatoform or Pain Disorder

19 Plaintiff notes, without further discussion, that the ALJ failed to mention a diagnosis of  
20 somatoform or pain disorder and, consequently, to discuss any limitations resulting from such a  
21 condition. The Commissioner does not directly respond to this contention.

22 The ALJ's decision does not reference a somatoform or pain disorder diagnosis. However,

01 plaintiff's bare assertion as to the omission of such a diagnosis fails to establish the existence of  
02 a reversible error. Moreover, as described below, the ALJ's decision does reflect adequate  
03 consideration of plaintiff's pain-related limitations at each step of the sequential evaluation.

04 Plaintiff bears the burden at step two to make a threshold showing that a medically  
05 determinable impairment significantly limits his ability to perform basic work activities. *See Bowen*  
06 *v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. § 416.920(c). In this case, the ALJ found,  
07 *inter alia*, plaintiff's shrapnel injuries, and the associated pain, a severe condition at step two.  
08 Plaintiff fails to show that a somatoform or pain disorder also significantly limits his ability to  
09 perform basic work activities. To the contrary, Drs. Steven Haney and John Robinson found  
10 plaintiff capable of working despite the presence of this diagnosis. (*See* AR 342, 346-47 and 382-  
11 83.)

12 At step three, “[t]he mere diagnosis of a [listed] impairment . . . is not sufficient to sustain  
13 a finding of disability.” *Young v. Sullivan*, 911 F.2d 180, 183-84 (9th Cir. 1990). Here, plaintiff  
14 proffers no more than the existence of a diagnosis. Nor does plaintiff otherwise establish that the  
15 ALJ erred in finding that none of his severe conditions met the requirements of a listing.

16 Finally, as discussed above, the ALJ adequately considered plaintiff's pain-related  
17 limitations at steps four and five. Therefore, for all of these reasons, plaintiff does not demonstrate  
18 error in the ALJ's failure to mention the existence of a somatoform or pain disorder diagnosis, or  
19 to discuss any possible resulting limitations.

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## **CONCLUSION**

For the reasons described above, this matter should be AFFIRMED. A proposed order accompanies this Report and Recommendation.

DATED this 6th day of October, 2005.

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Mary Alice Theiler  
United States Magistrate Judge